

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Patrick Browne	Team: Squad #8	CCRB Case #: 201509083	<input type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 10/23/2015 2:19 AM	Location of Incident: Outside § 87(2)(b)	Precinct: 33	18 Mo. SOL 4/23/2017	EO SOL 4/23/2017	
Date/Time CV Reported Fri, 10/23/2015 3:11 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 10/23/2015 3:11 PM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Witness(es)	Home Address
§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. SGT Noel Gutierrez	05149	934980	033 PCT
2. POM Dwight Powell	09038	951077	033 PCT
3. POM James Burke	28483	950127	033 PCT

Officer(s)	Allegation	Investigator Recommendation
A.SGT Noel Gutierrez	Abuse: Sergeant Noel Gutierrez stopped the vehicle in which § 87(2)(b) and an individual were occupants.	§ 87(2)(b)
B.POM Dwight Powell	Abuse: Officer Dwight Powell stopped the vehicle in which § 87(2)(b) and an individual were occupants.	§ 87(2)(b)
C.POM James Burke	Abuse: Officer James Burke stopped the vehicle in which § 87(2)(b) and an individual were occupants.	§ 87(2)(b)
D.SGT Noel Gutierrez	Abuse: Sergeant Noel Gutierrez stopped § 87(2)(b)	§ 87(2)(b)
E.POM Dwight Powell	Abuse: Officer Dwight Powell stopped § 87(2)(b)	§ 87(2)(b)
F.POM Dwight Powell	Abuse: Officer Dwight Powell frisked § 87(2)(b)	§ 87(2)(b)
G.POM Dwight Powell	Abuse: Officer Dwight Powell searched § 87(2)(b)	§ 87(2)(b)
H.SGT Noel Gutierrez	Abuse: Sergeant Noel Gutierrez refused to provide his name and shield number to § 87(2)(b)	§ 87(2)(b)
I.POM Dwight Powell	Abuse: Officer Dwight Powell refused to provide his name and shield number to § 87(2)(b)	§ 87(2)(b)
J.POM James Burke	Abuse: Officer James Burke refused to provide his name and shield number to § 87(2)(b)	§ 87(2)(b)
K.SGT Noel Gutierrez	Discourtesy: Sergeant Noel Gutierrez spoke discourteously to § 87(2)(b)	§ 87(2)(b)
L.POM Dwight Powell	Discourtesy: Officer Dwight Powell spoke discourteously to § 87(2)(b)	§ 87(2)(b)
M.POM James Burke	Discourtesy: Officer James Burke spoke discourteously to § 87(2)(b)	§ 87(2)(b)
§ 87(4-b), § 87(2)(g)	§ 87(2)(b)	§ 87(2)(b)

### Case Summary

There is no video footage associated with this incident, though the complainant did take a photograph of the officers' vehicle. At approximately 2:19 a.m. on October 23, 2015, § 87(2)(b) was in the back of an unmarked livery cab heading southbound on Broadway when an unmarked police car containing three officers—identified as Sgt. Noel Gutierrez, PO Dwight Powell, and PO James Burke of the 33<sup>rd</sup> Precinct—pulled them over between West 152<sup>nd</sup> and West 153<sup>rd</sup> Street in Manhattan (**Allegations A, B, and C**). As PO Burke spoke to the unidentified driver of the cab, Sgt. Gutierrez and PO Powell stood by the rear passenger's side door and spoke to § 87(2)(b). After brief conversation, PO Powell and Sgt. Gutierrez instructed § 87(2)(b) to step out of the car (**Allegations D and E**), which § 87(2)(b) did. PO Powell then frisked § 87(2)(b) (**Allegation F**) before allegedly entering his pants and jacket pockets (**Allegation G**). Without recovering any items, the officers walked back to their car, at which point § 87(2)(b) asked them for their information. Without providing any information, all three officers allegedly replied "I ain't showing you shit" (**Allegations H, I, J, K, L, and M**). After a brief further exchange on the matter, the officers departed without issuing any summonses to § 87(2)(b) or the driver, or making any arrests.

### Mediation, Civil and Criminal Histories

- § 87(2)(b) chose for this complaint to be investigated.
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]
- As of January 21, 2016, no notice of claim associated with this incident has been filed with the City of New York (see Board Review #2).

### Civilian and Officer CCRB Histories

- Sgt. Gutierrez has been a member of the NYPD for eleven years and has been a subject in two prior CCRB cases involving three allegations, none of which have been substantiated (see Board Review #3). Previous allegations of a stop and search were unsubstantiated.
- PO Powell has been a member of the NYPD for four years and has been a subject in six prior CCRB cases involving fifteen FADO allegations (see Board Review #4), none of which have been substantiated. He has been the subject of three prior discourtesy allegations, one stop allegation, and one search allegation, all of which were either unsubstantiated or closed as complainant uncooperative.
- PO Burke has been a member of the NYPD for four years and this is the first CCRB complaint against him (see Board Review #5).
- This is the first CCRB complaint filed by § 87(2)(b) (see Board Review #6).

### Potential Issues

Although the driver of the livery cab is a victim of the vehicle stop, neither § 87(2)(b) nor the officers could provide any identifying information for him such as a name, license plate number, or affiliated cab company. § 87(2)(g)

## Findings and Recommendations

**Allegation A—Abuse of Authority: Sergeant Noel Gutierrez stopped the vehicle in which § 87(2)(b) and § 87(2)(b) were occupants.**

**Allegation B—Abuse of Authority: Officer Dwight Powell stopped the vehicle in which § 87(2)(b) and § 87(2)(b) were occupants.**

**Allegation C—Abuse of Authority: Officer James Burke stopped the vehicle in which § 87(2)(b) and § 87(2)(b) were occupants.**

§ 87(2)(b) (see Board Reviews #7 and #8) did not definitively know why the officers stopped the cab, but was reportedly told by PO Powell during the stop that it was because the driver had made an improper turn on West 152<sup>nd</sup> Street. § 87(2)(b) stated that he informed PO Powell at the time that they had never even driven on West 152<sup>nd</sup> Street, so his claim was not possible. § 87(2)(b) reported that he never saw the officers ask the driver for identification and never instructed him to exit the vehicle.

Sgt. Gutierrez (see Board Review #9), PO Powell (see Board Review #10), and PO Burke (see Board Review #11) all stated that the vehicle stop was based solely on an observation of a traffic infraction. While Sgt. Gutierrez did not recall the specific violation, PO Powell stated that the driver had quickly crossed over two lanes of traffic without signaling and PO Burke maintained that it was for an improper turn onto Broadway. Both PO Powell and PO Burke noted in their memo books (see Board Reviews #12 and #13) that the stop was for an improper turn. Regardless, all three officers also added that the stop was made next to a cemetery stretching multiple blocks and is the site of recurring robberies and shootings. However, the vehicle stop was actually made on Broadway between West 153<sup>rd</sup> Street and West 152<sup>nd</sup> Street, one block south of the cemetery (see Board Review #14), as evidenced by a photograph § 87(2)(b) took of the officers' vehicle at the time of the incident (see Board Review #15). It is undisputed that the officers were assigned to anticrime, were dressed in plainclothes, and did not issue a summons for the observed traffic violation. PO Burke stated that he used his discretion to merely warn and admonish the driver and did not believe a summons was necessary.

§ 87(2)(g)

[REDACTED]

**Allegation D—Abuse of Authority: Sergeant Noel Gutierrez stopped § 87(2)(b)**

**Allegation E—Abuse of Authority: Officer Dwight Powell stopped § 87(2)(b)**

**Allegation F—Abuse of Authority: Officer Dwight Powell frisked § 87(2)(b)**

**Allegation G—Abuse of Authority: Officer Dwight Powell searched § 87(2)(b)**

§ 87(2)(b) stated that several hours prior to the vehicle stop, he had consumed only one beer and was not intoxicated. He stated that at the time of the stop, he was carrying his cell phone in one hand and a vaporizer in the other. He stated that he was wearing pants, a tee-shirt, and a jacket, and was carrying a wallet in one pants pocket and keys in the other pants pocket. He stated that there was no odor of alcohol in the cab. § 87(2)(b) claimed that after stopping in front of his building and paying the driver, he observed all three officers approach from both sides of the car. § 87(2)(b) stated that PO Burke first asked the driver where he had picked § 87(2)(b) up and if he had paid the fare. § 87(2)(b) stated that, at that point, he began questioning PO Powell and Sgt. Gutierrez, who were standing outside his door. § 87(2)(b) acknowledged asking the officers what the problem was, offering to provide his identification, and keeping his hands visibly raised because he was fearful of being shot. § 87(2)(b) maintained that the officers told him to be quiet and that they would explain what was happening in a minute. § 87(2)(b) maintained that PO Powell eventually told him that the stop was for an improper turn, which he then verbally disputed. § 87(2)(b) added that shortly thereafter, Sgt. Gutierrez asked him why he was sweating while PO Powell asked him where he was coming from and what he was doing in the neighborhood. § 87(2)(b) explained that he had just walked approximately thirty blocks on foot prior to getting in a cab.

It is undisputed that one of the officers ultimately instructed § 87(2)(b) to exit the car before frisking the front side of his entire body. § 87(2)(b) identified that officer as PO Powell and further alleged that following the frisk, he entered both of his front pants pockets without removing any objects. § 87(2)(b) stated that PO Powell subsequently requested his identification, which he provided. § 87(2)(b) reported that PO Burke briefly took the identification back to the vehicle before returning it and departing.

In the midst of the incident, § 87(2)(b) (see Board Review #16) was reportedly walking on the sidewalk and stopped to observe the interaction. Both § 87(2)(b) and § 87(2)(b) stated that they have lived in the same building for years, but are not close friends. § 87(2)(b) stated that when he arrived, § 87(2)(b) was already standing outside the vehicle speaking to the officers. § 87(2)(b) maintained that he stood on the sidewalk approximately twenty to twenty-five feet away from the vehicle, so he did not hear much of the conversation apart from § 87(2)(b) saying he lived in the adjacent building and declaring that if they wanted something from him, they should take it from his pocket. § 87(2)(b) stated that he then observed an officer move closer to § 87(2)(b) and motion as though to check his body, but he did not see what physical contact was made or if any pockets were entered because the officer's back was facing him and blocking § 87(2)(b). § 87(2)(b) claimed that he then saw the officer holding at least one object, though he did not see what the object was or how it was obtained.

All three officers stated that after stopping the vehicle, which they knew to be a cab based on its TLC license plates, they observed § 87(2)(b) quickly look backward and shift his body, though none of the officers could see what, if anything, he was doing with his hands because they were below the window line. None of the officers could describe his movements apart from them being

generally furtive and, according to PO Burke, characteristic of hiding a weapon. All three officers also stated that § 87(2)(b) appeared intoxicated due to slurred speech. Although Sgt. Gutierrez did not recall smelling alcohol, PO Powell and PO Burke stated that they did. Only PO Powell said that he noticed § 87(2)(b) sweating. Additionally, none of the officers suspected § 87(2)(b) of having committed any specific crime.

PO Powell testified that while he was standing next to § 87(2)(b) window, he saw that his hands were in his coat pockets, prompting PO Powell to instruct him to take them out. Although Sgt. Gutierrez did not recall seeing § 87(2)(b) place his hands in his pockets, he testified that he at one point instructed him to show them his hands. PO Powell maintained that despite initially removing his hands as instructed, § 87(2)(b) reinserted them while still in the car. All three officers, including PO Burke who was speaking to the driver on the opposite side, maintained that § 87(2)(b) became loud and verbally combative, questioning the basis for the stop. Although Sgt. Gutierrez and PO Powell did not recall any specific statements he made, PO Burke testified that he called the stop “bullshit.”

All three officers stated that § 87(2)(b) removal from the vehicle and subsequent frisk were intended only to check him for weapons so as to ensure officer safety and were predicated upon the poorly lit location adjacent to a high crime cemetery, his shifty movements in the vehicle as they approached (namely, looking over his shoulder), and his loud combative speech as he questioned the stop. PO Powell added that when § 87(2)(b) had exited the vehicle, he observed a bulge on one of his pockets, though he did not recall which pocket and could not describe the shape or size of the alleged bulge. Sgt. Gutierrez did not recall seeing any bulges on § 87(2)(b) clothing. PO Powell confirmed that § 87(2)(b) did not make any threatening movements or gestures towards officers. None of the officers recalled if anyone entered § 87(2)(b) pockets or removed any objects from his person.

In order to stop an individual, an officer must have reasonable suspicion that that individual has committed, is committing, or is about to commit a crime. In order to frisk an individual, an officer must have reasonable suspicion that that individual is armed or poses a threat of physical injury. People v. De Bour, 40 N.Y.2d 210 (1976) (see Board Review #17). In the absence of any additional specific factors, looking over one’s shoulder or ducking inside a vehicle are considered to be innocuous behaviors that would not provide reasonable suspicion of criminality or justification for a stop, frisk, or search. People v. Rossetti, 148 A.D.2d 357 (1<sup>st</sup> Dept. 1989) (see Board Review #18).

§ 87(2)(g)

§ 87(2)(g)  
[REDACTED]

[REDACTED]

[REDACTED]

**Allegation H—Abuse of Authority: Sergeant Noel Gutierrez refused to provide his name and shield number to § 87(2)(b)**

**Allegation I—Abuse of Authority: Officer Dwight Powell refused to provide his name and shield number to § 87(2)(b)**

**Allegation J—Abuse of Authority: Officer James Burke refused to provide his name and shield number to § 87(2)(b)**

§ 87(2)(b) alleged that as the officers returned to their vehicle, he made a general request for them to identify themselves, to which they all replied in unison, “I ain’t showing you shit.” § 87(2)(b) maintained that he when he subsequently insisted they provide their information, Sgt. Gutierrez replied, “I ain’t showing you nothing.” However, at the same time, § 87(2)(b) reported hearing PO Powell state that if he wanted to find him, he should go to the 23<sup>rd</sup> Precinct. § 87(2)(b) maintained that despite multiple additional requests, the officers entered their vehicle and departed without providing any information such as names or shield numbers. The photograph that § 87(2)(b) took after the officers entered their vehicle showed that they were several feet behind the cab.

§ 87(2)(b) stated that as the officers began walking back to their vehicle, he heard § 87(2)(b) ask them for their business cards. § 87(2)(b) maintained that they did not initially respond but instead continued to their car. § 87(2)(b) further stated that just before entering the vehicle, one of the officers told § 87(2)(b) to go to the 23<sup>rd</sup> Precinct and ask for either “John” or “Pablo,” though he did not clearly recall which name was provided. § 87(2)(b) corroborated

that none of the officers provided any other information, though he stated that he did not hear any officer state, “I ain’t showing you shit” or “I ain’t showing you nothing.”

At the time of this incident, all three officers were assigned to the 33<sup>rd</sup> Precinct. PO Burke denied hearing § 87(2)(b) ever request any officer’s name, shield number, or other identifying information. He also denied that either he or any other officer refused to provide such information to § 87(2)(b) including by stating, “I ain’t showing you shit” or “I ain’t showing you nothing.” Meanwhile, Sgt. Gutierrez did not recall if § 87(2)(b) ever requested any of the above information, though he also denied ever refusing or hearing any other officer refuse to provide it, or making any of the alleged statements. However, PO Powell testified that as the officers returned to their vehicle, § 87(2)(b) requested his name and shield number, though he did not know if he was requesting only his information or all officers’ information. PO Powell stated that he replied by stating, “Powell, 33<sup>rd</sup> Precinct,” though he acknowledged not providing his shield number. PO Powell did not recall any other officer providing their information, but denied that he or anyone else stated, “I ain’t showing you shit” or “I ain’t showing you nothing.”

An officer is required to clearly state his name, rank, shield number, and command to anyone who requests it. Patrol Guide Procedure 203-09 (see Board Review #19).

§ 87(2)(g)  
[REDACTED]

**Allegation K—Discourtesy: Sergeant Noel Gutierrez spoke discourteously to § 87(2)(b)**

**Allegation L—Discourtesy: Officer Dwight Powell spoke discourteously to § 87(2)(b)**

**Allegation M—Discourtesy: Officer James Burke spoke discourteously to § 87(2)(b)**

As explained above, § 87(2)(b) alleged that after he asked the officers for their information, they all replied to him in unison, “I ain’t showing you shit.” § 87(2)(b) did not hear any of the officers make this statement or use any profanity, but acknowledged that he was standing approximately twenty to twenty-five feet away from the interaction and did not hear all of what was said. Sgt. Gutierrez and PO Burke both denied making the aforementioned statement or using any profanity while speaking to § 87(2)(b) while PO Powell did not recall making that statement or using any profanity.

§ 87(2)(g) [Redacted]  
[Redacted]  
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§ 87(4-b), § 87(2)(g) [Redacted]  
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Squad: \_\_\_\_

Investigator: \_\_\_\_\_  
Signature Print Date

Squad Leader: \_\_\_\_\_  
Title/Signature Print Date

Reviewer: \_\_\_\_\_  
Title/Signature Print Date